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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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AMERICAN CIVIL LIBERTY UNION AND DOES 1-4,	)	
Plaintiffs,	)	**2:09-cv-1083-KJD**
v.	)	**UNITED STATES' AMENDED MOTION TO DISMISS DOCKET NO. 9 AND TO DISMISS THE CASE**
UNITED STATES ATTORNEY, DISTRICT OF NEVADA ,	)	
Defendant.	)	

CERTIFICATION

COMES NOW the United States Attorney's Office for the District of Nevada and files this Amended Motion to Dismiss the Amended Motions to Intervene, Quash and Protective Order," dated June 22, 2009 (Doc. 9) and to Dismiss Case No. 2:09-cv-1083-KJD.

This motion is based on accompanying memorandum of law, filed under seal.

It is hereby certified that the above-captioned document is filed in a timely manner.

DATED this 26th day of June, 2009.

Respectfully submitted,

GREGORY A. BROWER
United States Attorney

/s/ Peter S. Levitt
PETER S. LEVITT
Assistant United States Attorney

I.

BACKGROUND

On November 20, 2007, in *United States v. Kahre, et al* (2:05-cr-121-DAE-RJJ), a federal grand jury in the District of Nevada returned a third superseding indictment charging defendants Robert D. Kahre and others with felony income tax violations and other federal violations. Crim. Doc. 1671 (charging violations of 18 U.S.C. §§ 371, 1014, and 1343, and 26 U.S.C. §§ 7201, 7206(1), 7212(a)).

On May 21, 2009, voir dire and a second jury trial began in United States District Court for the District of Nevada, the Honorable Judge David A. Ezra, presiding. Crim. Doc. 2430.

On May 26, 2009, the Las Vegas Review Journal (the "R-J") published a two-page article about the trial, entitled: "Employer's gold, silver payroll standard may bring hard times." *See* Ex. 1 to Civ. Doc. 2 (attaching article). The article summarized the defense's position that, far from being guilty of the tax charges, Kahre was "an American 'hero.'" Ex. 1 (Civ. Doc. 2) at 1. The R-J article also quoted one of the prosecutor's remarks to the effect that the case was about "money, greed and fraud," and that Kahre and others had defrauded the Internal Revenue Service. *Id.*

Over the next few days, various online commenters posted responses to the R-J article. *See* Ex. 2 to Civ. Doc. 2 (attaching 42 pages of comments). O+ne commentator wrote: "The sad thing is there are 12 dummies on the jury who will convict him. They should be hung along with the feds[.]" Several days later, another commentator wrote: "I bid 10 Quatloos that [one of the Government prosecutors] does not celebrate his next birthday."

In response to the comment about hanging the "12 dummies on the jury . . . along with the feds," the Government served the R-J with a first grand jury subpoena, seeking disclosure of all the online commenters' identities. The R-J declined to comply and, on June 7, 2009, published an editorial criticizing the breadth of the first subpoena. *See, e.g.*, Civ. Doc. 2 at 2, n.1.

On June 9, 2009, one of the alternate jurors in the Kahre trial sent Judge Ezra a message regarding that juror's knowledge of the R-J's editorial. *See* Ex. 2 (Civ. Doc. 2), Tr. at 5-6. Judge Ezra conducted a sealed hearing to investigate whether the juror could continue to serve, a question ultimately resolved in the affirmative. During the hearing, Judge Ezra expressed concern with some of the more virulent comments posted by the anonymous commenters. *See* Ex. 2 (Civ. Doc. 2), Tr. at 28 ("There is a reasonable basis for the government to be concerned about at least a few of the comments on the blog which were . . . quite threatening."), 29 ("What we have out there are people making not even veiled threats, direct threats at jurors about what could happen to them if a particular result is not reached . . . and I am concerned about that."). Judge Ezra opined that if a comment had been posted

> for the express purpose of attempting to threaten the jury into reaching a particular verdict, that's a legitimate grand jury investigation. If the purpose of the grand jury inquiry is just a fishing expedition, then I would suggest not.

Ex. 2 (Civ. Doc. 2), Tr. at 13.

On June 16, 2009, plaintiffs filed Civil Docs. 2-4 in the above-captioned case. In Civil Doc. 2, three of the purported R-J commenters (calling themselves "DOES") asserted their purported "standing" to challenge the first subpoena, and advanced various reasons to proceed anonymously. Doc. 2 at 5-8. The balance of the motion (filed by the ACLU as putative intervener) advanced several reasons why the first subpoena should be quashed. *Id.* at 8-29.

That same day, the United States served the R-J with a superseding subpoena, which replaced the first subpoena. Pursuant to the superseding subpoena, the grand jury called upon the R-J to provide identifier information for only two posters who commented in regard to hanging the jury and the prosecutor seeing his next birthday. The grand jury no longer sought identifier information for all posters.

On June 17, 2009, this Court ordered that responses to Civil Docs. 2-4 be filed by June 22, 2009. Sealed Minute Order (June 17, 2009) at 1. On June 17, 2009, the ACLU sent two letters to this Court and parties. First, the ACLU advised this Court of its "plans to file an amended motion to quash and amended motion for protective order." *Id.* at 1. Second, in a letter to AUSA Eric Johnson, AUSA J. Gregory Damm, and Mark Hinueber (General Counsel for the R-J), the ACLU referenced the superseding subpoena, and observed that "the parties to the subpoenas appear to have reached agreement about what will be disclosed." The ACLU nevertheless "ask[ed] that the

Review-Journal delay compliance as long as possible . . . in order to allow the district court time to rule on the Motion to Quash." *Id.* at 1-2.

On June 18, 2009, notwithstanding the ACLU's letter, the R-J fully complied with the superseding subpoena. Thus, in a letter dated June 18, 2009 from the Roger Myers, Esq. (the R-J's counsel) to AUSA Johnson, the R-J "enclosed . . . the documents in the possession of the Review-Journal responsive to your above-referenced subpoena." Letter from Myers to Johnson (Jun. 18, 2009) at 1. Mr. Myers' letter enclosed the information sought by the superseding subpoena.

On June 22, 2009, plaintiffs filed their amended motion. Civ. Doc. 9. In it, plaintiffs (who now number four "DOES") assert that even the narrower, superseding subpoena should be quashed. *Id.* at 3 (citing the two R-J comments referenced in the superseding subpoena), 27 (suggesting that even the "narrowe[r]" subpoena is still "an attempt to squelch criticism and dissent"). The legal bases in support of plaintiffs' amended motion to quash are largely identical to those set forth in their first motion of June 16, 2009.

As shown below, the R-J's complete disclosure, viewed against the backdrop of the binding precedent, renders the amended motion moot. Accordingly, that motion must be dismissed.[1]

II.

ARGUMENT

Given the R-J's compliance with the superseding subpoena, plaintiffs' amended motion is moot and presents no justiciable case or controversy in an Article III court. Federal courts decide only "cases" and "controversies." U.S. Const. art. III, § 2. As the Ninth Circuit has explained, the Constitutional "case-or-controversy" requirement is closely aligned with the doctrine of mootness:

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[1] On June 22, 2009, AUSA Johnson spoke to Margaret A. McLetchie, Esq. of the ACLU regarding the ongoing litigation. From this conversation, AUSA Johnson concluded that Ms. McLetchie was not aware of the R-J's compliance on June 18, 2009. Moreover, plaintiffs' amended motion does not acknowledge the R-J's compliance. Given the secrecy rules that govern grand jury proceedings, the United States Attorney's Office deems it appropriate to file this amended motion (like our original motion to dismiss) under seal, and to vouchsafe to this Court's sound discretion the question of whether (and when) to unseal it.

> A case becomes moot whenever it loses its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. The question is not whether the precise relief sought at the time . . . [the case] was filed is still available. The question is whether there can be any effective relief.

Earth Island Inst. v. United States Forest Service, 442 F.3d 1147, 1157 (9th Cir. 2006) (internal citation omitted). Similarly, the Ninth Circuit has emphasized that "an actual controversy *must* be extant at *all stages* of review," and explained that a "case is moot when the issues presented are *no longer live* or the parties lack a legally cognizable interest in the outcome." *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 933 (9th Cir. 2008) (emphasis added) (internal citations omitted). The threshold inquiry, then, is whether the omnibus motion -- which seeks to preclude the R-J's compliance with the superseding grand jury subpoena -- raises issues that are now "no longer live" or for which there can be no "effective relief." *Council of Ins. Agents*, 522 F.3d at 933; *see also Earth Island Inst.*, 442 F.3d at 1157 (quoted in *Siskiyou Regoinal Educational Project v. United States Forest Service*, 565 F.3d 545, 559 (9th Cir. 2009) ("effective relief" test for mootness).

These principles, coupled with the R-J's compliance, underscore the present mootness of plaintiff's action. As shown above, plaintiffs seek to preclude an event that occurred on June 18, 2009 -- that is, the R-J's disclosure of the identifying information regarding two commenters, as requested by the grand jury. Accordingly, "live issues" do not now exist, and "effective relief" can no longer be provided. *See Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794, 804 (9th Cir. 2009) (suit to enjoin developer moot because agency delisted bald eagle; "Because the bald eagle has been delisted, no present controversy can remain," and "nothing we decide can properly give the Center the relief it sought"). Plaintiffs' amended motion is thus moot.

III.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court enter an Order that: (1) grants the motion to dismiss; and (2) dismisses Civ. Doc. 9 and dismisses case no. 2:09-cv-1083-KJD, without prejudice.[2]

DATED this 26th day of June, 2009.

Respectfully submitted,

GREGORY A. BROWER
United States Attorney

/s/ Peter S. Levitt
PETER S. LEVITT
Assistant United States Attorney

[2] Because the mootness issue disposes of this entire action, it is not necessary to proceed further. Nevertheless, the United States does not waive and expressly reserves the right to oppose every argument raised in Civ. Doc. 9, should opposition-on-the-merits become necessary.

CERTIFICATE OF ELECTRONIC SERVICE

AMERICAN CIVIL LIBERTY UNION , AND DOES 1-4 Plaintiff,	)	
vs.	)	**2:09-cv-1083-KJD**
UNITED STATES ATTORNEY, DISTRICT OF NEVADA Defendant.	)	

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on June 26th, 2009, she served a copy of the attached **UNITED STATES' AMENDED MOTION TO DISMISS DOCKET NO. 9 AND TO DISMISS THE CASE** to be delivered to all parties to this action by e-service.

DATED: this 26TH DAY OF JUNE, 2009.

/s/ Sarah Lauer-Overby
SARAH LAUER-OVERBY
Paralegal